



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. E7 OF 2021

IN THE MATTER OF A CLASS ACTION LAWS SUIT IN RESPECT OF CIVIL RIGHTS CLAIMS OVER DEMOLITION OF PRIVATE PROEPERTY BY KENYA RAILWAYS IN KISUMU –WEST SUBCOUNTY IN KISUMU COUNTY

AND

IN THE MATTER OF ARTICLE 13 OF THE DECLARATION OF RIGHTS AND DUTIES OF STATES, ARTICLE 27 OF THE VIENNA CONVERNTION ON THE LAW OF TREATIES, RIGHT TO DIGNITY UNDER THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND THE RIGHT TO HOUSING UNDER THE INTERNATIONAL COVENTANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

JEMILAH ADHIAMBO.....1ST PETITIONER

ROSE AWINDA.....2ND PETITIONER

SAMUEL BEIYE.....3RD PETITIONER

MONICA OGUTU.....4TH PETITIONER

PHILIP OGALO OLANG.....5TH PETITIONER

GEORGE OKELLO.....6TH PETITIONER

(Suing on their own behalf and on behalf of the affected residents of BANDANI, AIRPORT, KORANDO ‘B’ AND LELA AREAS OF KISUMU WEST SUB-COUNTY IN KISUMU OCUNTY)

VERSUS

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

(A) THE PETITIONERS’ CASE

1. Jemilah Adhiambo, Rose Awinda, Samuel Beiye, Monica Ogutu, Philip Ogalo Olang and George Okello (*hereinafter referred to as the petitioners*) have come to court against Kenya Railways Corporation and the Attorney General (*hereinafter referred to as the respondents*) stating that they are the affected residents of Bandani, Airport, Korando ‘B’ and Lela Areas of Kisumu West Sub-County In Kisumu County and have the authority of the other affected residents to swear, sign and plead this constitutional petition. The Petitioners claim to have filed this petition on their own behalf and also as a class action suit for and on behalf of the entire residents of Kisumu West Sub County in Kisumu County that are affected by the wanton destruction of property occasioned by the respondents on the 6/02/2021, 7/02/2021 and 9/02/2021.

2. The petitioners claim that they have known these lands in Bandani, Airport, Korando ‘B’ And Lela areas of Kisumu West sub-county in Kisumu County as ancestral lands in which their parents/grandparents lived right from during the pre-independence days and for which they have titles or otherwise are registered after the adjudication process so that they have all along know the suit parcels as their homes and also source of income through businesses or farming. The suit lands being the petitioner’s homes and residential areas were convenient for their school going children who by virtue of proximity have easy access to education and public amenities such as schools

3. The petitioners are aware that the Nakuru-Kisumu railway line was once bubbling with life and activity in the 1990's and for that reason they have always kept adjudication process and is captured in the land registry in respect of petitioners who have title to their lands. The respondents have initiated the upgrade through refurbishment of the old rail network from Nakuru to Kisumu which has been in existence for more than a century and is expected to connect to the recently refurbished Kisumu port, which will enable ferrying of cargo and passengers to Uganda, Rwanda, Burundi and Democratic Republic of Congo on ships via Lake.

4. According to the petitioners, the overall idea of the respondent is to achieve seamless train services, linking the newly built standard gauge rail (SGR) line and the refurbished meter gauge track which idea is appreciated by the petitioners as being of public interest as the same would not only revive passenger transport which the appellants are nostalgic about but also lead to the rise in economic activity of the Kisumu West region owing to the opening up of the regional markets through the Kisumu Port.

5. The petitioners aver that in a clear breach of the established norms of operations, the 1st respondent accompanied and assisted by police officers and the Provincial Administration (both chief and assistant chief) on the 6/02/2021 at about 2.00 am at night raided and destroyed homes and businesses belonging to about 300 families of Bandani area in Kisumu West Sub-County. The said demolition which was being carried out using bulldozers was done without any notice and effected by policemen who ensured that homes, stalls and hotels were destroyed all the way from overcomers to Bandani including in lands outside the 30 m distance from the railway line.

6. The petitioners contend that other than the destruction of homes, the Bandani area which can be defined as an informal settlement also experienced complete wiping out of small scale traders' stalls and wares which were strewn all over thereby subjecting this category of persons to poverty and financial strain. The Bandani residents have stayed in these parcels with their families for years and some have registered rights as demonstrated by the following petitioners who are the respective registered owners of their parcels: - Mwanahawa Anyango Hassan-Kisumu/Kogony/, Rose Atieno Awinda-Kisumu/Kogony/2289, Samwel Kimaiyo-Kisumu/Kogony/2306, Daudi Migot-Kisumu/Kogony/452.

7. The petitioners claim that Rose Awinda's main house as well as her three son's houses were completely demolished and they have now constructed temporary mabati structures on which they are staying. That Mwanahawa Anyango house with a family that includes her daughter Jamilah Adhiambo was destroyed together with everything inside including chicken which were buried by rubble. They also had a hotel within the compound which was the only source of income together with her stock of sacks of small fish which were also buried in the rubble. That Samwel Kimaiyo's main house was completely flattened while his cows and goats disappeared in the course of the melee at night. He also has children going to both primary and secondary and so he was forced to build temporary structures on which the family is currently staying.

8. That on the 9/02/2021 at about 7.30 a.m about 100 residents of Korando B in Kisumu West Sub-County of Kisumu County and specifically areas from Rainbow to Maunga to Kisian Railway Station were ambushed by a team from Kenya Railways accompanied by policemen that came without notice purporting to take measurements of their properties more than the requisite 30 meters from the railway line thereby placing marks on homesteads and people's properties some of which have duly registered title deeds. That the team destroyed homes and properties amongst other belonging to the residents of KORANDO/B.

9. The petitioner's further complaint is that on 7/02/2021 at about 3.00 p.m. the 1st respondent officers accompanied by police officers visited Lela area in Kisumu West-Sub County and demolished two houses of Agnes Atieno and Otiende and then placed marks on numerous other properties which the residents were asked to voluntarily remove and that part of the affected residents who had their houses marked for eviction on the material day and asked to remove their properties from their parcels are Okello George Okello-Kisumu/Marera/1889, Luci Obilo and Seline Oluoch.

10. The Petitioners pray that that this court finds and declares that the respondents have jointly and severally been responsible for the denial/violation/infringement of the petitioner's rights and fundamental rights in the bill of rights under articles 10 (2) (b), 25, 26, 27 (1), 28, 29 (f), 39, 40, 43(1), 43(1)(f), 47 and 56 of the constitution and that the 1st respondent engages the petitioners and all the Project Affected persons in KISUMU WEST-SUBCOUNTY in crafting a relocation Action Plan. THAT the petitioners and all members of the public who fall within the bracket of this class action in Kisumu West-Sub County be entitled to compensation. The petitioner prays for Damages and Costs of the petition.

(B) 1st RESPONDENT'S REPLY

11. The 1st respondents filed replying affidavit stating that the deponents Jemilah Adhiambo and Clementine Majuma Ongaro lack the capacity to institute and prosecute the Petition. That the land in question either fully or in part falls within a railway reserve and/or visibility diamond within a Level Railway Crossing. That the 1st Respondents are entitled by law under The Kenya Railways Act Cap. 397 to construct and maintain among other accommodations, Railway level Crossings on both public and private roads in the manner prescribed both in the act and the Railways and the East African Railways and Harbors Engineering Manual Volume 1.

12. That there is a mandatory legal requirement for the maintenance of what is called the Visibility Diamond stretching 300 feet on each of the four directions along the diagonals of the crossing. The Law prohibits any constructions or erection of any structures and even growing of any plants beyond 9 inches within the Visibility Diamond. The aim of this legal requirement "shall be to maintain a distance standard visibility that will enable a motorist, when he is at least 300 feet from the crossing, to see the leading component of the train when it is also at least 300 feet from the crossing" and equally the locomotive driver. That the alleged suit parcel comprising allegedly residential and business units by petitioners were within a "Visibility Diamond" on a Rail/Road Level Crossing and that if indeed the petitioners acquired title to such land and went ahead to erect residential and business structures without the approval of the first respondents' managing director then the said acts were both illegal and created a danger to the general public, motorist and even the Locomotives using the level crossing.

13. That if any structures are put on the said Visibility Diamond without the approval of the managing director, the 1st Respondents would be entitled to have such structures removed which endanger safety at the Level Crossing and the petitioners would not be entitled to any

compensation.

14. The 1st respondent denies that she demolished homes and property on suit land without notice as alleged and confirms that the operation was undertaken by the multiagency operation team composed of national Government administrative officers, Presidential Delivery Unit, National Police service among others. That the encroachers and trespassers on Railways land, reserves and visibility diamonds had been given sufficient notice to vacate and/or remove any illegal structures and encroachments. The first notice was a Public Notice in the Government Publication on 20/03/18, another in the daily Newspapers on the 27th September 2019 and again on the 30th September 2019.

15. The 1st respondent contends that since the structures allegedly demolished were either on a railway reserve or a visibility diamond, they formed a danger to the general public safety on the Railway Level Crossing and as such the balance of convenience does not tilt in favour of the applicants. The petitioners/applicants will also be required on trial to demonstrate how they acquired title to land reserved for a Railway Level Crossing Visibility Diamond and proceeded to erect structures on it which would jeopardize the safety of the general public who use the railway line and the road in that area. That since the subject matter are land within either Railway lands, reserves or visibility Diamond on whose encroachment puts railway operations and public safety at stake, the balance of convenience in grant of injunctive orders cannot be in favour of the applicants as it would be against public interest.

(C) PETITIONERS' SUBMISSIONS

16. The petitioners submitted that in carrying out the forced evictions and demolitions the respondents breached the constitution by infringing on the petitioners right to housing (shelter) as envisaged under article 43 of the constitution by destroying their homes hence leaving them homeless and infringing on the petitioners' right to dignity under Article 28 and housing under Article 43 by failing to follow the Supreme Court jurisprudence in SUREME COURT PETITION NO. 3/2018 – MITU BELL WELFARE SOCIETY V KAA & 2 OTHERS on the application the UN guidelines when carrying out forced evictions and demolitions.

17. Subjecting the petitioners to inhuman treatment contrary to Article 25 of the constitution by carrying out evictions at night and without notice. Infringing on the petitioners right to life contrary to Article 26 by destroying their shelter hence exposing them to life threatening conditions and diseases in the shacks and makeshift structures in which they now stay with their children. Infringing on the petitioners' right to equal protection and benefit of the law by carrying out evictions at night, without notice, without alternative settlement or compensation contrary to Article 27 (1) of the Constitution. Subjecting the petitioners to inhuman and degrading treatment contrary to Article 29 (f) of the Constitution. Compromising the petitioners to inhuman and degrading treatment contrary to Article 39 of the constitution by unprocedurally destroying their shelter. Infringing on the petitioners right to property contrary to Article 40 of the constitution. Compromising on children's right to education contrary to Article 43 (1) of the constitution by abruptly destroying their parents homes without alternative places of shelter. Denying the petitioners the right to fair administrative action (due process) contrary to Article 47 of the constitution by carrying out evictions without following the requisite guidelines. Subjecting women (who are the majority in Bandani) and children to inhuman treatment notwithstanding that they are minority and marginalized groups that the state ought to proactively assist through affirmative action.

18. The petitioners submit that the said evictions were not carried out in accordance with the United Nations Guidelines on Evictions as issued by the United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 "The right to adequate housing (Art.11.1): forced evictions: (20/05/97) CESCR General comment 7." (General Comments).

19. The evictions went against the positive obligations imposed upon the state by article 43 for the Constitution to ensure access by its citizens to social economic rights, whose realization is progressive and dependent upon, the availability of resources and we urge the court to adopt the Supreme Court's upholding of the High Court decision reinforcing the South African case of Irene Grootboom and Others v. The Government of the Republic of South Africa and Others (2001) (1) SA 46, 'the Court held that under Article 21 (1) the Constitution, the state and private individuals have a negative obligation to observe, respect, protect, promote, and fulfill the rights and fundamental freedoms. Further, the Court found that the state had an obligation to protect the appellants' existing homes, rudimentary as they were, while doing what it could, to the extent to fits available resources, to ensure their progressive access to adequate housing.'

20. The petitioners further submit that the forced evictions cum demolitions without notice or otherwise alternative accommodation amounted to a violation of the right to housing and other social economic rights which are protected under articles 43, 21 and 10 of the Constitution and that the respondents violated the petitioner's right to Non-discrimination and equal Protection of the Law, by carrying out selective demolition of the petitioner's homes, houses and temporary shacks and business places for allegedly being on the railway line reserve, while sparing expensive buildings and hotels such as a hotel by the name DIVINE HOME in OTONGLO area and KISIAN SECONDARY SCHOOL both of which are just a few inches from the railway lien therefore the whole process wreaked of discrimination and is a violation of the right to non-discrimination and equal protection of the law guaranteed under Article 27 (1), (2) and (4) of the constitution.

21. The petitioners contend that compensation must be identified in the nature that would be adequate to allow for the project affected person's relocation and resettlement after ascertaining the value of the interests and the proposed alternative relocation areas.

22. Further that the project affected persons be granted just and appropriate remedy in the form of damages for the constitutional violations in a way that will vindicate their rights and freedoms. In assessing the damages the petitioners urge that the court adopt the position crafted by the supreme court of Canada in Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 that the same must meaningfully vindicate the rights and freedoms of the claimants; employ means that are legitimate within the framework of our constitutional democracy; be a judicial remedy which vindicates the right while invoking the function and powers of a court; and be fair to the party against whom the order is made.

(D) 1ST RESPONDENTS SUBMISSIONS

23. The 1st respondent submits that the petitioners have failed to prove to the required standard that the alleged raids were conducted by the

1st respondent in order for the burden of proof to shift to the 1st respondent to refute the alleged assertions. Be that as it may, the 1st respondent has denied that it carried out the demolitions as alleged by the petitioners'. It is the 1st respondent's case that the said exercise, to the best of its ability was undertaken by the multi-agency operation team composed of the National Government Administrative Officers, Presidential Delivery Unit, National Police Service amongst others and that the 1st respondent's officers were not involved at all. A perusal of the photographs shows that once cannot tell whether the 1st respondent's officers were involved in the alleged raids. Neither do the photographs ascertain the time and/or date the said raids are stated to have been conducted.

24. In the circumstances, the 1st respondent invite this court to find that the petitioners' have failed to discharge the burden of proof to the required standard as required under the evidence Act.

25. The 1st respondent relies on the authority of *Kiambu County Tenants Welfare Association v Attorney General & another* [2017] eKLR where the court held as follows: "Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any).

26. Respondent relied on Lord Brandon in **Rhesa Shipping Co. SA vs Edmunds (1955) 1 WLR 948 at 955 remarked:-**

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

27. The 1st respondent argues that whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. He relies on the dictum of Rajah JA in **Bristone Pte Ltd vs Smith & Associates far East Ltd (2007) 4SLR at 855 at 59:-**

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

28. According to the respondent, the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities.

He relies on the case of **Miller vs Minister of Pensions, {1947} 2ALL ER 372** Lord Denning said the following about the standard of proof in Civil cases:-

'The..{standard of proof} .. is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We thing it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

Also, in Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR,where the court held:

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favorable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.

29. The respondent submits that the petitioners have not placed sufficient evidence before court to demonstrate that they are entitled to the orders sought. petitioners occupy and/or have caused structures to be erected on the suit property without obtaining approval of the Managing Director as required under section 16 of the Kenya Railways Corporation act. It is on this basis that the 1st respondent moved to publish several notices on 20/3/2018, 27/9/2019 and 30/9/2019 at the Government Publication as well as the daily newspapers being The Standard and The People Daily calling upon those with titles to land within its reserve and visibility diamonds to surrender the same and move out of the properties.

30. Article 40 of the Constitution guarantees every person the right to acquire and own property provided title to property was lawfully acquired. In this instant case, section 16 of the Kenya Railways Corporation Act as read with section 7 of the Engineering Manual Vol 1- Technical Instructions over the East African Railways and Harbours, create a legitimate expectation for persons who have acquired interest in land within 300 feet of the Level Crossing to obtain approval from the Managing Director before erecting any structures. The mischief behind such a pre-requisite was to enable the 1st respondent perform its statutory obligation of preventing any danger in the supply of rail or transporting services and for which they are at risk of being found liable. Without compliance with the statutory minimum of obtaining the requisite approvals, the petitioners do not have legal basis to allege a violation of their right to property thus entitled to compensation over the loss.

31. The petitioner argues that the alleged costs for putting up the structures have not been substantiated. The Evidence Act stipulates that he who alleges must prove to the required standard and in this instance; the petitioners have failed to justify the amounts they claim to have incurred in putting up the structures. Moreover, the basis for seeking compensation is tainted for failure to meet the prerequisite statutory conditions before erecting structures within 300 feet of the Level Crossing. The petitioners with titles to the property therefore lack the right to claim compensation for wrong done when their acts in erecting structures on the property stemmed from an illegality that is, without approval of the Managing Director of the 1st respondent. The 1st respondent relies on **Macfov vs United Africa Company Ltd (1961) 3**

ALL E.R. 1169. Lord Denning at page 1172 held as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but it is incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is funded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Also, The Court of Appeal in England in the case of Birket vs Arcon Business Machines Ltd [1999] 2 ALL ER 429 held that-

“If a transaction was on its face manifestly illegal, the court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the court might refuse to enforce it even if illegality had not been pleaded or alleged. The principle behind the court’s intervention of its own notion in such a case was to ensure that its process was not being abused by an invitation to enforce sub silentio a contract whose enforcement was contrary to public policy.”

32. In respect of the petitioners who claim that the suit property is ancestral land having resided therein since time immemorial hence seeking protection of the court following the holding of the Supreme Court in Mitu-Bell Welfare Society v Kenya Airports authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR and the petitioners who claim to have titles but have failed to tender any documentation in support of ownership alleged in paragraph 25 of the petition and the consent marked as JAD2, the 1st respondent argues that, such petitioners are termed informal settlers having settled on public land. No property rights are said to be enjoyed by them but rather, they acquire protectable rights pursuant to Article 43 as read with Article 60 of the Constitution provided they have established homes and raised families on the land. In accordance to the holding in the Supreme Court case, constitutional courts adjudicating over such petitioners alleging violation of the **Article 43 as read with Article 60 rights** have lee way to ensure that protection rights include compensation, adequate notice before eviction. The 1st respondent argues that the petitioners have failed to prove that the evictions were undertaken by the 1st respondent as alleged. The 1st respondent cannot be found to have failed to observe humane conditions in the eviction exercise and thus be liable in compensating the petitioners as sought. Secondly, as deposed, the petitioners were given several notices over time with the first once being issued on 20/3/2018 through the Government publication calling upon all encroachers on the land vested with the 1st respondent without due process to vacate or face eviction

33. Similar warnings were also published on 27/9/2019 and 30/9/2019 in the standard and People Daily respectively which notices constitute reasonable notices. A distinction is notable to the Mitu-bell case (supra) wherein the appellants were given a 7-day notice through a publication in the newspaper proper to being evicted and which notice was found to be unreasonable. The petitioners can therefore not claim to not have been notified when in the Mitu-bell case (supra), notification in the daily newspaper was found to constitute notice albeit unreasonable since it required the informal settlers to vacate within 7 days.

34. The 1st respondent is not in a position to provide alternative land for settlement in the even an eviction is to proceed for the reason that the 1st respondent is statutory corporation having been established under the Kenya Railways Corporation Act with a specific mandate as set out in the object of the act as well as the functions and powers therein.

35. The 1st respondent under the Kenya Railways Corporation Act is not bound to settle landless people provided that the said petitioners settled in land vested in it for two reasons. The first reason is that the land vested in the 1st respondent is land which is reserved not for settlement of landless people but for provision of rail and transport services as stipulated in the Act. The second reason is that the obligation of providing every person with the right to accessible and adequate housing is reserved for the State under **Article 21 (2) as read with Article 43 (1) (b) of the Constitution**. See Gideon Mbuvi Kioko vs Attorney General & 6 others [2012] eKLR where the court found that the inclusion of various state corporations including Kenya Railways was unnecessary as settlement of landless people was not within the purview of state corporations but a reserve of the state under article 21 as read with Article 43 of the Constitution.

36. This mandate was restated by the court when it heard the petition on merit and lay emphasis of this role on the state in Gideon Mbuvi Kioko vs Attorney general & another [2017] eKLR.

37. In this case, the 1st respondent invites this court to decline to condemn the 1st respondent to pay Kshs 300,000,000 as damages without proof that the 1st respondent carried out the alleged violations. He also invites this court to decline to award the said amount as the same would allow the petitioners to unjustly benefit for acting in contravention of the law thus justifying the disobedience. Besides, no material has been placed before this court to justify the award of Kshs. 300,000,000 as sought. He relies on Moi Education Centre Co. Ltd (Supra), where, the court after affirming the constitutional rights violations meted against the evictees, set aside the award for damages and compensation by the trial court. The 1st Respondent invites this court to be guided accordingly and dismiss this petition with costs.

(E) 2ND RESPONDENTS SUBMISSION

The 2nd respondent submitted that the petitioners have not demonstrated a cause of action against the Attorney General and amplified the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 in (the Mutunga Rules) Rule 10 2 (d) which provides that the petition shall disclose the following:-

(d) The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

That It is a cardinal rule of justice and fairness that a party who has been sued is entitled to know the exact case he is called up to answer; in this case, the Respondents role in the role in the alleged violation of the rights of the Petitioners. The Attorney General relies on Article 50

(1) of the Constitution provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

The Honorable Attorney General argues that as any other dispute a petition is not a merry making affair and relies on the case of **Anarita Karimi Njeru vs Republic (No. 1) [1979] 1 KLR 154** which is settled authority for proposition that where a person is alleging a contravention or threat of contravention of a Constitutional right, he must set out the right infringed and the particulars of such infringement or threat. The starting point is obviously the pleadings that set out the Petitioner’s case. The court stated:

If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he shall set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

Further in **Trusted Society of Human Rights Alliance vs Attorney General & 2 Others {2012} eKLR** the court of reflecting on the principle above stated:

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional petitions. Neither does it requires talismanic formalism in identifying the specific constitutional provisions which are alleged to have identifying the specific constitutional provisions which are alleged have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that give proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.”

The Attorney General contends that the petition herein only sights the respondent as an adviser of the government which is undeniable however there is no nexus that has been established between the 2 entities as they have rightly stated the 1st respondent who is a statutory creature is and to add on it it’s a body corporate. Section 3 of the Kenya Railways Corporation Act provides as follows

(1) There shall be established a Corporation to be known as Kenya railways, in this act referred to as the Corporation.

(2) The Corporation shall be a body corporate with perpetual succession and a common seal and shall have power to sue and be sued in its corporate name and to acquire, hold and dispose of movable and immovable property for the purposes of the Corporation.

Ultimately the Attorney General submits that the corporation is in charge of their own actions and did them independently of the government. Besides nothing has been pleaded in the petition of violations by any state department. The 2nd Respondent pray that the petition against them be dismissed.

(F) ISSUES FOR DETERMINATION

i. WHETHER THE PETITIONERS WERE EVICTED BY THE RESPONDENTS

ii. WHETHER THE EVICTION WAS LEGAL.

iii. WHETHER THE PETITIONERS SHOULD BE COMPENSATED

(i) WHETHER THE PETITIONERS WERE EVICTED BY THE RESPONDENTS.

38. For the court to deal substantively with the main issue it is important that the discerns the burden and standard of proof in civil cases. *The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya. The said section states as follows: -*

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

39. *The onus is therefore upon a Petitioner to prove that the facts alleged exist. On the, evidential burden of proof, the Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegations fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court, then it becomes the burden of the Respondents to adduce evidence rebutting the*

allegations.

40. The majority decision of the Supreme Court in **Presidential Election Petition No. 1 of 2017** between **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR** had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced. It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....”

41. From the foregoing, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.

42. The **Black’s Law Dictionary**, (9th Edition, 2009) at page 1535 defines **‘the standard of proof’** as **‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’**

43. The standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt. In the matter before me, it is not disputed that the Petitioners were evicted from the suit property. The 1st Petitioner Jemilah Adhiambo states that the affected area is traversed by the railway line that connects Kisumu to Nakuru and Kisumu to Butere. The petitioners are categorical that they were evicted by the Kenya Railways Corporation. Though the Kenya Railways corporation denies being involved in the eviction vide the replying affidavit of Mr. Mwanja Mativo, the Assistant Infrastructures manager, he goes ahead to state that the land in question belongs to the 1st respondent and that falls within the Kenya railways reserve or visibility diamond within a level Railways crossing. That on the said crossing there is need to maintain what is known as visibility diamond stretching 300 feet on each of the four directions along the diagonals of the crossing.

44. The 1st respondent contends that the law prohibits the erection of structures beyond 9 inches within the visibility diamond so as to enable motorists to see the train while approaching the crossing. The 1st respondent contended further that the suit parcels of land comprising residential and commercial units were constructed within the level Railway crossing without the approval of the 1st respondent and therefore such structures ought to have been removed as they were a danger to motorists approaching the railway crossing. Moreover, that the petitioners and other encroachers were given sufficient notice to vacate the premises that is in a public notice published in government publication and the daily newspaper.

45. The 1st respondent admits that the operation was conducted by the multiagency operation team composed of national Government, administrative officers, Presidential Delivery Unit, National Police service among others. That the encroachers and trespassers on Railways land, reserves and visibility diamonds had been given sufficient notice to vacate and/or remove any illegal structures and encroachments. On the 1st issue I do find that the petitioner has satisfied this court that the 1st respondent was part of the multiagency operation that evicted the petitioners from the disputed area having given notices in a government publication and newspapers and therefore the next issue is whether the evictions were legal. The 1st respondent by this admission implicates the state represented by the honorable the Attorney General of Kenya.

(ii) WHETHER EVICTIONS WERE LEGAL

46. Article 40 of the Constitution of Kenya provides that **Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description; and in any part of Kenya. Moreover that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or to limit, or in any way restrict the enjoyment of any right under the Article on the basis of any of the grounds specified or contemplated in Article 27 (4). Furthermore, that the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that requires prompt payment in full, of just compensation to the person; and allows any person who has an interest in, or right over, that property a right of access to a court of law. The Article in sub-Article 6 provides that the rights under the Article do not extend to any property that has been found to have been unlawfully acquired.**

47. Though it is not clear how many petitioners had title deeds, some titles have been annexed in the supporting affidavits. The import of Article 40(6) is that before a person is said to have unlawfully, corruptly or illegally acquired a parcel of land, due process has to be followed. It is only a court of law that can determine that one has acquired land illegally. The respondents have no power to determine or find that a person has acquired a parcel of land illegally. It was an illegality for Kenya Railways Corporation to undertake the eviction of the petitioners from the suit land in respect of which the petitioners had titles that had not been declared as having been illegally, unlawfully, fraudulently or corruptly obtained.

48. Moreover, the petitioners right to housing was violated as their houses were demolished at night without considering the petitioners welfare and that they had school going children and generally disrupted the petitioners social and economic life and therefore the evictions were contrary to Article 43 of the Constitution of Kenya that provides that every person has the right to the highest attainable standard of

health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and) to education. That a person shall not be denied emergency medical treatment and that the State shall provide appropriate social security to persons who are unable to support themselves and their dependants. This is because the eviction affected the petitioners' rights of access to social economic rights as their houses were demolished, and their general social security was disrupted due to the evictions,

(iii) **WHETHER THE PETITIONERS SUFFERED ANY LOSS**

49. The petitioners have proved that they were evicted from the disputed are and that they lost their homes and structures and that their children's education was disrupted, however, the materials placed before me is not sufficient to assess the quantum of damages as a result of the evictions. In awarding compensation for the specific damage that the petitioners claimed they had suffered, this court should inquire into the nature of such loss. If necessary, the petitioners should be granted an opportunity to prove the damage and for the respondent and the State to test the petitioners' claims.

50. The Privy Council observed in the case of Siewchand **Ramanoop vs. The AG of T&T, PC Appeal No 13 of 2004** that in most cases involving violation of constitutional rights, the remedy of a declaration by the court may not in itself be sufficient and there are cases where "more will be required than words." Lord Nicholls stated in that case that:

"...A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law."

51. In the present case, the evictees were obliged to place material before the court on the basis of which an assessment of damages would be undertaken. Lord Kerr in the case of **Romauld James vs. AGT [2010] UKPC** adopted the following the words, which are applicable here:

"In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."

(G) CONCLUSION AND RELIEFS

52. The petitioners have alleged that they have titles to the suit properties but were evicted from the same parcels without a court order and that there is no finding that the suit properties were illegally acquired. However, it is not possible to establish whether the title annexed by the petitioners relate to the properties wherein they were evicted and if so whether they were acquired legally. The 1st respondent claims that the property in dispute belongs to the Kenya Railways Corporation but did not provide the court with any evidence that the titles issued to the petitioners were in respect to the land that is owned by Kenya Railways. There are no Maps, survey records and reports to support the 1st respondents claim.

53. With the above conflicting evidence, I do find that the petitioners have not given this court sufficient evidence that they are the registered owners of the property wherein they were evicted and even if so whether the property was acquired legally.

54. The 1st respondent admitted that the eviction operation was undertaken by the multiagency operation team composed of national Government administrative officers, Presidential Delivery Unit, National Police service among others and therefore the Attorney General is liable on behalf of the Multi-Agency National Government Units.

55. The petitioners pray for compensation, however, no evidence has been placed before the court to assist the court to assess the loss suffered by the petitioners and the court cannot come up with a figure for compensation without justification. The only order this court can grant and does grant is that the respondents have jointly and severally been responsible for the violation of the petitioners fundamental rights in the bill of rights by failing to abide by Article 10(2) b and 28 and 43(a) to (f) of the constitution of Kenya by failing to ensure that the petitioners were treated with human dignity, equity, during their eviction from the suit premises and that the respondents infringed on the petitioners guarantee of economic and social rights and failed to give the petitioners a fair administrative action. Half costs of the suit to be borne by the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19

pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE